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446410—42

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 931

THE NORTH ELECTRIC MANUFACTURING COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 879–884) is reported in 123 F. (2d) 887. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 808–856) are reported in 24 N. L. R. B. 547.

JURISDICTION

The decree of the court below (R. 877) was entered on November 12, 1941. The petition for a writ of certiorari was filed on February 9, 1942.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

Petitioner urges the following two questions, but we think neither of them is necessarily presented since the Board's order is adequately supported even if both questions are answered in petitioner's favor:

1. Whether anti-union statements made by petitioner's supervisory employees and an advertisement published by petitioner which were found by the Board to constitute interference, coercion, and restraint are protected by the First Amendment to the Constitution.

2. Whether petitioner is responsible under the National Labor Relations Act for anti-union statements and actions of certain members of its supervisory staff.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, p. 14.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 808–856). The facts, as found by the Board

and as shown by the evidence, may be summarized as follows:[1]

Soon after International Association of Machinists, Local 1151 (herein called the Union), began to organize petitioner's employees in January 1938 (R. 823; R. 148–149, 504–505, 530), Superintendent Bernard and Assistant Superintendent Haspeslagh, with the knowledge and approval of petitioner's secretary-treasurer, Davis, directed that a poll of petitioner's employees be taken in the plant during working hours to ascertain whether the men favored or opposed the Union;[2] accordingly, designated employees, including five supervisors, H. A. Helfrich, Paul Helfrich, Lucius, Yeager, and Spangler,[3] canvassed the departments

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[1] In the following statement the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

[2] Petitioner does not challenge the Board's finding (R. 814–815) that Bernard and Haspeslagh were supervisory officials for whose conduct petitioner is responsible. Bernard ranked directly under the two top officers of petitioner and Haspeslagh directly under Bernard; they were in charge of production and assembly and had power to hire and discharge (R. 814–815; R. 424, 427, 434, 593–594).

[3] The Board found (R. 814–823) that petitioner was responsible for their acts of interference, restraint, and coercion, as well as for those of two other supervisors, Christman and Brown, whose antiunion conduct is discussed, *infra*, p. 5. H. A. Helfrich was "day boss" over the assembly department containing approximately 100 employees, was regarded by the employees as their "foreman," "[kept] the department running," assigned and supervised work, recommended discharges and pay increases, handled disciplinary

interrogating each employee in turn and making written tallies in some cases of the results (R. 823–825; R. 117, 158, 252, 258–259, 282–283, 288, 290, 298, 434, 437–439, 461–462, 515–516, 547, 556, 600, 601, 617). When one department unanimously indicated approval of the Union, Supervisor Yeager declared that Assistant Superintendent Haspeslagh

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matters, and was directly responsible to Superintendent Bernard for completion of all work in the department (R. 817–818; R. 138, 258, 265–266, 300, 336, 538–540, 543, 546, 549–554, 579, 595–597). Lucius, Yeager, Spangler, and Christman were each "senior employees" or "set-up men" in particular departments ranking directly under Assistant Superintendent Haspeslagh from whom they received work orders; Paul Helfrich was the "boss" of the lay-out department; and Brown was "chief inspector" in the inspection department (R. 818–821, 822, 816; R. 271–272, 425–426, 560). Each had between 2 and 11 employees working under him to whom he assigned work and gave instructions, and whose work he inspected and criticized (*ibid.;* R. 291, 294, 320, 332–333, 335–336, 377–378, 392–396, 408, 411, 476, 482, 496, 498–500, 516, 561, 618); they were generally considered by their subordinates as "foreman" or "boss" (*ibid.;* R. 250, 272–273, 282, 285, 286, 289, 294, 305, 306, 307, 519, 549, 560); and some of them, at least, made recommendations which might involve demotion, transfer, or discharge (*ibid.;* R. 390–393, 408–409, 411, 428–429, 446).

The Board (R. 829–830) rejected petitioner's contention that antiunion conduct of these men was not chargeable to petitioner because these men allegedly were themselves eligible to membership in the Union. In the first place, it found that the record did not support the contention of eligibility to Union membership (R. 830; R. 281, 293, 508); and, in any event, that the men were using their power and authority as supervisors to affect choice of a labor organization by their subordinates (R. 830).

"didn't like this 100 percent department worth a damn," and asked an employee whether he would "change [his] mind" (R. 826, 827; R. 290). Supervisor Paul Helfrich, while conducting the poll, likewise voiced hostility to the Union and the possibility of a decline in operations if the plant were organized (R. 827–828; R. 272, 457–458). The Board found that petitioner's conduct of the poll (R. 824–827) and the accompanying antiunion statements (R. 827–828, 832) constituted interference, coercion, and restraint in violation of Section 8 (1) of the Act.

In March, when the Union sought to bargain with petitioner (R. 832–833; R. 742–743), seven supervisory employees [4] took a leading part in preparing, signing, and obtaining employee signatures to an anti-union petition; many of the signatures were solicited in the plant and a number were secured during working hours (R. 832–838; R. 285–287, 346–347, 360–361, 373, 384–388, 396–397, 401–402, 460, 463–464, 478–479, 519–520, 528–529, 547–549, 560, 563–564, 567–568, 751). Although the fact that the petition was being circulated in the plant was brought to Assistant Superintendent Haspeslagh's attention, he took no steps to halt or disavow it (R. 837–838; R. 399–400, 435–436). In contrast, not long before, Haspeslagh had reprimanded an employee for distributing Union cards

[4] H. A. Helfrich, Paul Helfrich, Lucius, Yeager, Spangler, Brown, and Christman. See note 3, *supra*.

because "we don't care to have any literature passed around inside the plant" (R. 837–838; R. 431, 436). The Board found that the initiation and circulation of the anti-union petition constituted further interference, coercion, and restraint in violation of Section 8 (1) chargeable to petitioner on two grounds: (1) the participation therein of the seven supervisory employees, and (2) the approval and ratification implicit in Haspeslagh's failure to halt or disavow the circulation (R. 838, 836).

During this period Supervisor H. A. Helfrich (*supra,* p. 3, note 3) made anti-union statements to various employees. He warned that petitioner was "bidding on certain jobs, and if the shop went union, they would let some of those jobs go" (R. 828; R. 269); characterized the Union leaders as "a bunch of racketeers and liars. All they are after is your $3 and after that they will leave you flat" (R. 828; R. 545, 299); forbade discussion of the Union even outside of working hours (R. 828–829; R. 260–261); and stated that membership in the Union had prejudiced and would continue to prejudice promotion (R. 829; R. 261). The Board found that these anti-union statements constituted further interference in violation of Section 8 (1) (R. 832).

In April, when Union representatives sought to participate in a collective bargaining conference with petitioner, the latter despite the Union's

strenuous objection insisted not only upon the presence of 11 employees selected by the company from among its "older and more intelligent" workers as "observers," but upon a loudspeaker system to insure that other employees could listen in upon the negotiations (R. 838–839; R. 87–88, 101–102, 725). After a detailed consideration of occurrences at the meeting (R. 839–840; R. 724–741), the Board found that the purpose and effect of petitioner's conduct was to deny the Union "equal dignity, status, and responsibility," and to "undermine the confidence of the union members in their representatives and to dissuade other employees from becoming members of the Union" (R. 841–842, 843); the Board found that petitioner thereby had engaged in further interference in violation of Section 8 (1) (R. 843).[5]

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[5] The court below rejected this finding and the order insofar as it was based thereon as "unwarranted by the terms of the Act" (R. 881–884). We think the court's decision in this respect to be clearly erroneous and a striking example of substitution of the judgment of a court without expert knowledge of labor relations for the informed and expert judgment of the administrative tribunal set up by Congress to assess such conduct. We have not, however, regarded the issue, when limited to this one case, to be of sufficient moment to warrant a petition for certiorari on behalf of the Board. We have nevertheless briefly set forth the incident and the Board's finding thereon because the meeting constitutes part of the "totality of the Company's activities during the period in question" (*National Labor Relations Board* v. *Virginia Electric & Power Company*, Nos. 25, 26, this Term, decided December 22, 1941).

Finally, when later in April the International Brotherhood of Electrical Workers instituted an organizational drive at petitioner's plant [6] and distributed handbills setting forth, as an example of its success in securing improved working conditions, the wage-and-hour schedules of a competing manufacturer (R. 843–844; R. 773–774), petitioner published a full-page advertisement in a local newspaper, intended to be read by the employees (R. 846; R. 71, 74), implying unmistakably that the I. B. E. W. was being employed by petitioner's competitor as a tool to destroy petitioner through wage increases which would place it in a disadvantageous competitive position (R. 844; R. 701). The Board found that, viewed against the background of petitioner's precedent anti-union activities, the advertisement constituted a "warning that the [petitioner] would oppose the I. B. E. W. and throw the weight of its economic power against the efforts of its employees to form or carry on such an organization, and that affiliation of its employees with the I. B. E. W. would result in the loss or lessening of their employment" (R. 847, 845–846); hence that this publication constituted further interference in violation of Section 8 (1) (R. 848).

The Board concluded that in these various ways petitioner had interfered with the rights guaranteed its employees in Section 7, contrary to Section

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[6] The Union and the I. B. E. W., both A. F. of L. affiliates, had agreed to make a joint effort to organize petitioner's plant (R. 843; R. 201).

8 (1) of the Act (R. 854). The Board's order directed that petitioner cease and desist from in any manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed in Section 7, and that it post appropriate notices (R. 854–855).

On August 29, 1941, petitioner filed in the court below a petition to review and set aside the Board's order (R. 859–867); the Board answered requesting enforcement (R. 868–871). On November 12, 1941, the court handed down its opinion (R. 879–884) and on the same day entered a decree (R. 877) enforcing the Board's order except in the one respect heretofore noted (*supra*, p. 7, note 5).

ARGUMENT

1. Petitioner contends (Pet. 4, 5, 8, 9–16) that its supervisors' anti-union statements and its published advertisement (Statement, pp. 4–5, 6, 8) constituted an exercise of the right of free speech and expression protected by the First Amendment. This contention depends upon an issue of fact, i. e., whether the statements and advertisement may fairly be deemed to have constituted interference with, coercion, or restraint of the rights guaranteed to petitioner's employees by Section 7 of the Act. The right of free speech does not include the right to coerce employees, through speech or otherwise. *National Labor Relations Board* v. *Virginia Electric & Power Co.*, Nos. 25, 26, this Term,

decided December 22, 1941.[7] The unambiguous statements of petitioner's supervisors expressing hostility to the Union, warning against loss of employment in the event of unionization, and stressing that membership in the Union stood in the way of promotion (*supra*, pp. 4–5, 6) were clearly coercive and not mere expressions of opinion. So too petitioner's advertisement, read in the light of petitioner's preceding anti-union conduct, constituted interference with employee rights of free choice. Contrary to petitioner's assertion (Pet. 11), it is clear from the Board's decision (R. 847, 845–846) that, unlike the Board's finding with respect to the ambiguous bulletin involved in the *Virginia Electric* case, the Board's conclusion as to the coercive nature of the publication in the instant case was "based on the totality of the Company's activities during the period in question." The *Virginia Electric* case, *supra*.[8]

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[7] Although the opinion in the *Virginia Electric* case speaks of coercive conduct "evidenced in part by speech," and of "pressure exerted vocally" as part of a "course of conduct," we assume that this does not mean that vocal or written pressure may not be unlawful in and of itself. For example, just as blackmail or extortion is illegal although consisting entirely of oral or written communications, it is plainly unlawful for an employer to do nothing more than inform his employees, orally or in writing, that they will lose their jobs if they join a particular union. Only if a statement is not on its face coercive, as in the *Virginia Electric* case, can it be necessary to consider its effect in the light of other circumstances.

[8] The Board expressly found that "under these circumstances" (R. 846), referring to a summary of the other find-

Nor is there conflict, as petitioner asserts (Pet. 5, 11–12, 13–16), with various cited cases in the circuit courts of appeals. None of these cases holds that statements of an employer which are coercive or intimidating are protected by the First Amendment; on the contrary, in each of them the court expressly or impliedly recognized that communications which may reasonably be said to coerce employees are outside the range of constitutional protection. The inquiry in each case was directed to the question whether the Board's finding that the statements were coercive was supported by substantial evidence. Those cases thus turned, as does the present one, upon their particular facts.

But even if petitioner's contentions concerning the constitutional question were well-founded, review is not warranted in this case because the Board's order is sufficiently supported by the additional findings of Section 8 (1) violation arising from the employer-conducted poll and the employer-circulated anti-union petition (Statement, pp. 3–6). *National Labor Relations Board* v. *Automotive Maintenance Machinery Co.*, No. 188, this Term, decided February 16, 1942, enforcing 13 N. L. R. B. 338, 342, 346–347; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 518; *International Association of Machinists* v. *Na-*

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ings (R. 845), and "in the light of preceding events" the advertisement constituted "a warning that the respondent would oppose the I. B. E. W." (R. 847).

tional Labor Relations Board, 311 U. S. 72, 76. Since review of the constitutional question would not affect the ultimate result, this case presents no proper occasion for such review.

2. Petitioner's claim (Pet. 4, 5–6, 8–9, 17–20) that the Board and the court below erred in holding petitioner responsible for the anti-union statements and activities of H. A. Helfrich, Paul Helfrich, Yeager, Lucius, Spangler, Brown, and Christman is immaterial. The evidence summarized in the Statement (*supra,* pp. 3–4, 5–6, 8) abundantly establishes that petitioner, through officers and officials whose supervisory status is unquestioned, engaged in conduct violative of Section 8 (1); this furnishes adequate foundation for the Board's order. Moreover, petitioner's claim is without merit. The evidence (*supra,* pp. 3–4, note 3) fully supports the Board's holding that these seven men occupied a supervisory status sufficient under the decisions of this Court to charge petitioner for their anti-union statements and activities. *International Association of Machinists* v. *National Labor Relations Board,* 311 U. S. 72; *H. J. Heinz Co.* v. *National Labor Relations Board,* 311 U. S. 514; *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584.[9]

[9] Petitioner's effort (Pet. 20) to distinguish the *Machinists* case serves merely to emphasize the controlling character of that decision here. Petitioner's claim of conflict with various decisions of the circuit courts of appeals (Pet. 5–6, 18–20), even were it well-founded, does not call for review;

CONCLUSION

The decision below, in so far as it sustained the Board's findings and order, is correct and presents neither a conflict of decisions nor any question of general importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

ROBERT B. WATTS,
General Counsel,
ERNEST A. GROSS,
Associate General Counsel,
MORRIS P. GLUSHIEN,
DAVID FINDLING,
Attorneys,
National Labor Relations Board.

FEBRUARY 1942.

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this Court will not review a decision which is in accord with the controlling decisions of this Court merely because of the "conflict" created by other lower court decisions which may have applied principles contrary to those of this Court. The review, if any, should be of the latter cases. Moreover, the decisions cited by petitioner apparently turned upon their own facts.